IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 20552

ISLAND AIRLINES, INCORPORATED, *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

PETITIONER'S REPLY BRIEF

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A. THE CLAIM OF RES JUDICATA

The CAB brief rests first (and apparently foremost) on the contention that the pending issues have been decided by this Court's decision in *Island Airlines, Inc.* v. *Civil Aeronautics Board,* 352 F. 2d 735 (1965). Under that case, this one is claimed to be *res judicata,* or barred by way of collateral estoppel (CAB Br., 8-10). The cited props for this argument are *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U.S. 381 (1940) and *Commissioner of Internal Revenue* v. *Sunnen,* 333 U.S. 591 (1948).

The question in *Adkins* was merely whether two government agencies were so far identical that a judgment against

the plaintiff in a suit involving one agency barred the same plaintiff from re-litigating the same point in a new action against the second. The answer: Yes. The case has no meaning here since we concede that the appellant and respondent in this case are the same as in the earlier one.

Sunnen holds the reverse of what the CAB seeks to prove by it. The question was whether a Tax Court decision involving royalty contracts which generated income in particular years was binding as to other, but identical, contracts of the same taxpayer in later years. The answer: No. The Court held that *res judicata* applies only to repetitious suits "involving the same cause of action," and continued (597, 599-600, 602):

> "But where the second action between the same parties is upon a different cause or demand, the principle of *res judicata* is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' [Citations] Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time. But matters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel. In this sense, *res judicata* is usually and more accurately referred to as estoppel by judgment, or collateral estoppel."
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> "[Collateral estoppel] must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged. [Citation] If the legal matters determined in the earlier case differ from those

raised in the second case, collateral estoppel has no bearing on the situation."

* * * * * * * * *

"For income tax purposes, what is decided as to one contract is not conclusive as to any other contract which is not then in issue, however similar or identical it may be."

In terms of the *Sunnen* test, neither *res judicata* nor collateral estoppel bars, or can be stretched to bar, the present appeal. At issue here is the question whether the CAB wrongly refused a requested exemption. That question never has been and never could have been previously decided because no exemption had been sought prior to the CAB proceeding which terminated in the order now under review.

The First *Island* case came to this Court from the District Court for Hawaii. *Civil Aeronautics Board* v. *Island Airlines, Inc.*, 235 F. Supp. 990 (1964). The Opinion narrates the scope and history of the case, revealing that:

1. Island inaugurated intra-Hawaii interisland service in 1963 under a rate order of the Hawaii Public Utilities Commission but without a CAB certificate. The PUC order was upheld by the Supreme Court of Hawaii (See 235 F. Supp. at 991-93).

2. The CAB sued Island in the District Court for an injunction against continuance of Island's interisland service without a CAB certificate. The CAB claimed exclusive jurisdiction on the ground that inter-island flights were impossible "without passing through air space over a place outside the state . . ." (235 F. Supp. at 992).

3. The injunction based on the decision at 235 F. Supp. 990 was preceded by one which this Court had set aside for failure of the District Court to find explicitly

the boundaries of Hawaii. This Court described the boundary question as the "root of the problem." *Island Airlines, Inc.* v. *Civil Aeronautics Board,* 331 F. 2d at 207, 208 (1964). The reason for requiring vacation of the injunction was that the injunction implied the international status of the inter-island channels, thereby raising "a constitutional question of equal protection of the laws, something traditionally avoided by the courts, if there be a non-constitutional basis for decision" (331 F. 2d at 208).

4. On remand, the District Court (a) found explicitly that the interisland channels were international, and (b) reinstated its injunction. It twice characterized the boundary question as the *only* issue in the case, stating (235 F. Supp. at 993):

> "... no problem is presented other than the determination by this court whether Island is carrying on air transportation in violation of Section 401 (a) of the Act."
>
> * * *
>
> "The evidence and argument presented before this court thereafter, [i.e., after remand] was almost entirely confined to 'the root of the problem ... [viz.] where is the boundary or boundaries of the state of Hawaii?' "

5. The District Court held that Hawaii was not demoted to second-class statehood or deprived of equal footing by reason of Congressional omission to give the state control of the interisland passages (235 F. Supp. at 1007-8).

6. Having determined that the State of Hawaii did not include the interisland channels, the District Court held that the international channels were a "place" outside Hawaii under Section 101(21)(a) of the Federal Aviation Act (235 F. Supp. at 994).

In affirming the District Court, this Court summarized Island's contentions on appeal in these terms (352 F. 2d at 738-9):

> "(1) The boundaries of a state are determined by Congress, not international law. Congress, by the Hawaiian Statehood Act, established the 'channels' between the Hawaiian Islands as being within the boundaries of the State of Hawaii. And even if we assume the enjoined flights pass over international waters subject to no sovereignty, such waters are not 'a place' within the statute defining 'interstate air transporation.' (49 U.S.C. § 1301 (21)(a).)
>
> (2) The federal courts (a) should have abstained from exercising jurisdiction; (b) the federal courts had no jurisdiction; and (c) the State of Hawaii was an indispensable party.
>
> (3) Certain findings as to flight patterns and effect on subsidies are without evidentiary support."[1]

This Court's opinion addressed itself primarily to the first of these contentions, agreeing with the Court below as to State boundaries and the status of interisland waters as a "place". It also dealt briefly but explicitly with the constitutional question foreshadowed in its first opinion, stating (352 F. 2d at 744):

> "We find no 'invidious discrimination' against the State of Hawaii in the court's decision below. 'Equal boundaries to each state are not necessary.' United States v. Louisiana, 363 U.S. 1, 77."

It is thus clear that this Court's only constitutional ruling was that the Hawaii Admission Act was not unconstitutional in failing to award the open seas between the islands to the new State—and Island claims nothing to the contrary in this proceeding. On the basis of the constitu-

[1] A fourth contention had to do with a counterclaim not here relevant.

tional ruling that the islands of Hawaii were separated by international waters, it held that the Federal Aviation Act applied to interisland transportation in accordance with the Act's explicit terms—and Island claims nothing to the contrary in this proceeding.[2]

Island's uncertificated operations and its resistance to the CAB injunction proceedings against them rested on the view that the Federal Aviation Act did not cover interisland flights because Hawaii was, from end to end, a geographical unit. This Court held that the Act *does* apply, since the State is *not* a geographical unit. The decision that the Act applies means that the whole Act applies; and since the whole Act contains an exemption provision, the decision validates that provision as clearly and completely as it validated the certification requirement.

This Court's decision that the Act covers Island's operations necessarily means that a certificate is needed unless the CAB grants an exemption, because that is what the Act says. The decision means nothing as to whether an exemption should be granted, because none was ever before sought. The *res judicata* contention of the CAB omits to note that (a) the earlier case was a constitutional contro-

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2 This Court expressed its general conclusion thus (352 F. 2d at 742):

> "If the flights are intrastate, then of course, the federal courts should not permit the C.A.B. to require a certificate, but conversely, if the 'channels' are high seas, then flight over them should and must be subject to the C.A.B.'s authority. This general principle of the supremacy of federal control over interstate and high seas flights must prevail, *if the facts support it*, over the paramount importance to the Hawaiian economy of inter-island air transportation." (Italics added)

While the District Court discussed some operational and economic matters (235 F. Supp. at 1008) which it thought to favor national over local regulation, this Court brushed such pronouncements aside as mere "make weight" (325 F. 2d at 744). As this Court noted in the first Island appeal, the case lacks "anything to do with safety—a function of the Federal Aviation Authority. The sweep of the decree in its present form could only be sustained on the basis that the intervening seas (less offshore limits) are no part of the State of Hawaii." (331 F. 2d at 208)

versy over the scope and validity of the Hawaii Admission Act, whereas (b) this case presents issues of administrative law involving the propriety of agency conduct under the Federal Aviation Act. The two problems are palpably discrete.

The CAB asserts (CAB Br., 10) that "there has been neither change in the dispositive facts nor any intervening legal development" since the injunction suit. That assertion ignores the exemption application which is the whole fabric of this case. No question bearing on exemption (or on any other administrative power of the CAB) was "considered less than six months ago" or "decided adversely to Island" because no such question was considered or decided ever—for the reason that no such question had ever arisen.

B. ABUSE OF DISCRETION

1. Non-Responsiveness of the Board's Brief

The CAB Brief seems to us almost systematically nonresponsive to the Island presentation. Island's case for exemption was tendered to the CAB as a basic problem of federalism, involving the most sensitive of political subjects, viz: the distribution of sovereign power between a state government and the national government.[3]

We contended in our opening brief that the Board in denying exemption had ignored the applicable constitutional and administrative principles and failed either to find or heed the facts necessary to guide it in the application of such principles. Its brief is a repetition and amplification of the same errors. Nowhere between its covers does the brief offer a hint of recognition of Hawaii's accession to statehood; of the bearing of that event on the Board's administrative obligations; of the State's declared need for economical air service; of its unique geography; of its isolated

[3] Island Opening Brief, 9-11, 14-33.

position; of the shortcomings of existing carriers; of those carriers' boasts of monopoly; of their failure to meet relevant criteria of convenience and necessity; or of any circumstance beyond the unsupported grumble of Aloha and Hawaii that competition will cost them patronage and boost the level of federal subsidy. We submit that the Board's conduct constitutes a plain abdication of official duty.

2. The Exemption Power—Judicial Authorities

Besides declining to debate, the Board seeks protection behind a flurry of citations which either do it no good or much harm. For the proposition that Island misconceives the nature of exemption, the Board cites (CAB Br., 13) *United Air Lines, Inc.* v. *Civil Aeronautics Board,* 278 F. 2d 446 (D.C. Cir., 1960),[4] *American Airlines* v. *Civil Aeronautics Board,* 235 F. 2d 845 (D.C. Cir., 1956), and *Pan American World Airways* v. *Civil Aeronautics Board,* 261 F. 2d 754 (D.C. Cir., 1958), cert. denied, 359 U.S. 912 (1959).

What *United* held as to exemption was (278 F. 2d at 449):

> "We do not have before us exemption authority under Section 416 of the Act and so express no opinion on that matter."

If the Court had expressed an opinion, its precedential value would have declined observably when the Supreme Court vacated the judgment *sub nom. All American Airways, Inc.* v. *United Air Lines,* 364 U.S. 297 (1960).

American Airlines was cited by Island (Island Opening Brief, 6) for the proposition that orders in exemption cases must be supported by adequate findings. The order in *American* was so broad that it evoked assault by two printed columns of appellants comprising virtually the whole network of the country's major airlines plus a railroad for good measure (235 F. 2d at 845). Despite the

[4] Mis-cited by the Board as 279 F. 2d.

breadth of the exemption order—which permitted 49 nationwide air carriers to make 10 flights a month each between any pair of points—the Court held that the order was within the Board's competence *if supported by proper findings* (235 F. 2d at 851). Only for the lack of such findings was the exemption set aside; and only for the same reason did the Court invalidate the exemption order involved in *Pan American.*

3. The Board's View of the Public Interest

The CAB brief, like the order under review, reflects throughout an obsessive concern for the protection of Aloha and Hawaiian against competition, and equates such protection with the public interest without revealing what public, or what interest of such public, is the object of the Board's fierce paternalism. The Board's attitude is a puzzlement in view of the disparity between its own prejudices and the strongly conflicting views of the Hawaii Government. The State (as a state, in distinction to a territory) has unquestioned authority as *parens patriae,* to voice the transportation needs of its citizens and to seek their federal recognition. *Georgia* v. *Pennsylvania R.R. Co.,* 324 U.S. 439 (1945). There the Court said:

> "Georgia as a representative of the public is complaining of a wrong, which if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected. Georgia's interest is not remote; it is immediate." (324 U.S. at 451).

In its capacity of *parens patriae,* Hawaii represented to the CAB and represents to this Court that the public interest calls for a state-regulated economy-type service in addition to the services of Aloha and Hawaiian. We do not

claim that the CAB must take orders from Hawaii but we do claim, and the cases prove, that it was obligated to resolve the issues which Hawaii tendered within the scope of this proceeding—which is precisely what the Board declines to do.

The Board (CAB Br., 14) adopts the test whether Island's service will "unduly impinge on the certificated system"—concluding without inquiry that it will; and reminds the Court (CAB Br., 18) that the agency "customarily takes into consideration the competitive impact . . . upon existing carriers operating pursuant to certificates of public convenience and necessity"—thereupon reflexively delegating its veto to Aloha and Hawaiian.

We do not see how the Board can decide whether "impingement" is "undue" without at least trying (a) to gauge its effect and (b) to appraise the standing and performance of the entrenched certificate-holders. It made no move in either direction but would have absorbed some meaningful learning had it done so.

As to the effect of "impingement", the Board could have learned from its own published study (annexed to Island's Opening Brief as Appendix B) that competition can stimulate the moribund, to their great (if unwanted) advantage.[5] If it did not wish to look so far, it had only to read its own decision on the certification of Aloha (then called Transpacific), for convincing proof that Aloha's competition would *and did* help Hawaiian to increase its

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[5] The Board now recoils from this study (CAB Br., 22) because it does "not necessarily reflect the official views or opinions of the Board Members themselves" and because it was only designed "to throw light on the factors generating air passenger traffic." We are intrigued by the unique practice of coyly issuing official documents so that the public can try to guess whether the Board thinks that they mean what they say. We submit that unless the figures in the study are false, they fulfill brilliantly their mission of casting light on the relationship between competition and passenger volume.

passengers and revenues. *Hawaiian Intraterritorial Service,* 10 C.A.B. 62, 66, 78-79 (1948).[6]

The same case qualifies in substantial measure the implications of the Board's statement here (CAB Br., 20) that "Hawaiian and Aloha, both operating pursuant to certificates issued by the Board, are part of the national air transportation system."

As has been noted (Island Opening Brief, 13-14), Hawaiian and Aloha were both certificated before statehood. Hawaiian received a grandfather certificate (CAB Br., 3, n. 3) on proof of nothing whatever except early arrival on the scene. Aloha was certificated later (10 C.A.B. 62) on the ground that Hawaiian's monopoly was bad for the territory (10 C.A.B. at 65). The Board found that Aloha had recurrently violated the Civil Aeronautics Act and would be unfit for certification under normal standards, but would be certified nevertheless because no other monopoly-breaker was at hand (10 C.A.B. at 67). The Board, finding need

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[6] "The provision for a second or alternative service for an area almost wholly dependent on air transportation is not the sole benefit which would be derived from granting a certificate of public convenience and necessity to Trans-Pacific. The award would have the incidental advantage of providing a competitive spur to Hawaiian, and of assuring the continuation of improved services which may have been instituted by Hawaiian as a result of the service of the noncertificated carriers. The record shows that, about the time Trans-Pacific and other non-scheduled air carriers started service, Hawaiian instituted a number of improvements in its service. Thus, in the summer of 1946 it began to make use of travel bureaus, and also provided additional, and in many instances more convenient, ticket facilities for the traveling public. In the spring of 1946 Hawaiian reduced fares to an average of 6.5 cents per mile and also expanded its facilities and obtained additional aircraft. In February 1948, a few weeks after Trans-Pacific discontinued all common-carrier operations, Hawaiian raised fares to yield 7.5 cents per revenue passenger mile, an increase of approximately 15 percent. Whether this increase was a coincidence or a result of the termination of Trans-Pacific's operations, the foregoing are examples of improvements in service which take place under the stimulus of competition. *It should be noted also that during the period Hawaiian was operating under the lower fares, its operating revenues were increasing over the corresponding period in previous years.*" (10 C.A.B. at 66). (Italics added.)

to scrape the bottom of the barrel, dutifully braced itself and scraped—and came up with the Aloha certificate.[7]

These conditions of certification of Aloha and Hawaiian detract from the protective lustre that more conventionally-earned certificates normally carry. Not only do the facts negate the usual implications of public convenience and necessity, and of fitness, willingness, and ability to perform, but quite as importantly, they refute the Board's assertion that the two carriers are part of the national transportation system.

The case which brought forth Aloha's certificate was concluded in 1948 while Hawaii was a territory with thirteen years to go before statehood. The title of the case was *Hawaiian Intraterritorial Service*. The first sentence of the Report (10 C.A.B. 62) states: "In this proceeding the Board is considering the air transportation needs of the Territory of Hawaii." The reasons given for providing additional service within the territory had nothing to do with any relationship to a national transportation system: rather, they took account of the "great distance" between Hawaii and the mainland which forced most Hawaiians who travelled at all to travel *within* the territory (10 C.A.B. at 77). Thus, the interisland carriers were recognized not as a part of the national transport system but as carriers whose existence was justified because they were outside of such system. Certainly a service which was "local" under territorial status does not become national under statehood.

We are not, of course (as the CAB implies we are—CAB Br., 22, n. 22) seeking decertification of Aloha or Hawaiian. We are urging that in view of the conditions of certification, neither certificate confers automatic and ever-

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[7] The Board said: "We do not intend to reward wrongdoers by granting certificates . . ." (10 C.A.B. at 67), and granted the wrongdoer a certificate.

lasting immunity, on grounds of public interest, against future competition. In summary, our position is:

1. Hawaiian received a grandfather certificate.
2. On certification, Hawaiian became a monopolist whose monopoly the CAB pronounced detrimental to the public interest.
3. To break the monopoly, the CAB certified Aloha despite a finding of unfitness under normal criteria.
4. Neither carrier was certified as a part of the national air transportation system but merely as a local carrier in an isolated federal territory.
5. Neither Aloha nor Hawaiian has passed the tests by which they would be judged in seeking certification after Hawaii's accession to statehood.

The CAB not only persists in forecasting (contrary to relevant indicators) loss of revenue to Aloha and Hawaiian if they encounter competition, but an automatic increase in federal subsidy to offset the decline. Surely the law calls for no such fiscal extravaganza. If Island survives on low fares and no subsidy, it will be proving not that the Aloha and Hawaiian subsidies must be boosted but that they should be dropped. No sane conception of public interest demands that there must always be a subsidy, or a supplicant to claim it. In any event, the CAB has not attempted to refute our legal demonstration (Island Opening Brief, 23-25) that a vital state police power cannot be negated for the sake of pinching federal pennies.[8]

4. Hawaiian Statehood

The CAB Brief (CAB Br., 5, 15-22) incorrectly interprets the history of the Hawaii Statehood Act as proof that Congress meant to keep interisland air transportation

[8] The District Court's observations on the relationship between competition and subsidy (235 F. Supp. at 1009) were beyond the issues in the injunction suit, and were not adopted by this Court on appeal.

"subject to economic regulation *by the Board.*" The Senate Committee on Insular Affairs reported merely that "the provisions of the Federal Aviation Act . . . should continue in accordance with the definition of interstate air transportation as contained in that Act."[9] The Committee was reporting only the Hawaiian Statehood Act (Pub. Law 86-3, 73 Stat. 4). The Statehood Act embodied no amendment to the Federal Aviation Act and thus could not have changed its meaning. The Statehood Act in Section 18 *did* refer explicitly to the Interstate Commerce Act and the Shipping Act as regards their application to Hawaiian commerce. Its references to those statutes while omitting any reference to the Federal Aviation Act reinforces the natural conclusion that the Aviation Act remained in *status quo*. Accordingly, Hawaiian interisland commerce remained under the Federal Aviation Act (as it would had the Committee remained silent)—but not inevitably subject to regulation by the Civil Aeronautics Board—because the Act provides a system for the granting of exemptions. Nothing in the Statehood Act curtails the use of the exemption mechanism.

While the injunction litigation affirmed the constitutionality of the Statehood Act and the consequent applicability of the Federal Aviation Act, it went no further.[10] It neither conferred nor implied a license for the CAB capriciously to strip Hawaii of a vital State power without necessity, or to ignore an urgent local condition as an element of the public interest. This Court held on the injunction appeal

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[9] S. Rep. No. 80, 86th Cong., 1st Sess. (1959).

[10] Even the basis for applicability of the Federal Aviation Act to Hawaiian interisland transportation remains obscure. As Island has shown (Island Opening Brief, 18, n. 21), such transportation involves "commerce with foreign nations" under Lord v. Goodall, 102 U.S. 541 (1881), whereas it is "interstate" under the Act. The discrepancy evidently troubled the District Judge in the injunction suit, since in quoting from Lord, he substituted asterisks for the words "with foreign nations"—leaving the San Francisco-San Diego Voyage characterized merely as "commerce * * *" (235 F. Supp. at 995).

that the general principle of federal supremacy must control "if the facts support it". (352 F. 2d at 742). The exemption petition reviews the facts and demonstrates that this is one instance where federal authority should accede to state control. When Hawaii became a state, it acquired the full range of prerogatives of all other states, including the right to have the Federal Government forbear from heedless intrusion into local affairs.[11] Even if the Congress could constitutionally preempt the power of regulating interisland commerce, the CAB cannot claim equally wide-ranging authority in the absence of sound reason for its action. It is subject, as Congress is not, to a broad spectrum of administrative restraints. Among them, we submit, is a restraint against usurpation of state power to solve a state problem when the usurpation serves no serious federal objective.[12] But except as it seeks cover behind this Court's previous *Island* decision (CAB Br., 15, 24), the Board never comes to grips with the question as to how the separation of Hawaii's island areas by patches of open

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[11] Island Opening Brief, 15-17.

[12] The position of Hawaii as spokesman for its citizens is analogous to that of the citizen protestants in *Office of Communication of the United Church of Christ* v. *Federal Communications Commission*, ... F. 2d .... (D. C. Cir., March 25, 1966). The FCC had denied such protestants standing as parties. The Court of Appeals reversed, stating (slip opinion, 17, 22):

> ". . . unless the listeners—the broadcast consumers—can be heard, there may be no one to bring programming deficiencies or offensive overcommercialization to the attention of the Commission in an effective manner."
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> * * *
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> "When past performance is in conflict with the public interest, a very heavy burden rests on the renewal applicant to show how a renewal can be reconciled with the public interest. Like public officials charged with a public trust, a renewal applicant, as we noted in our discussion of standing, must literally 'run on his record.'"

While Aloha and Hawaiian have nothing before the CAB for renewal, the exemption application inherently tests their continuing right to shut out competition on the basis of stale certificates granted under superseded conditions. When they seek to perpetuate their monopoly, they should be required to "run on their record" as the Court required of the renewal applicant in the case cited.

sea diminishes Hawaii's interest, as compared to other states, in seeking to meet local transportation needs. In its brief, the Board asserts that this Court's adjudication in the injunction case prohibits the grant of exemption. Thus the brief is a clear admission that the petition was never seriously considered by the Board, because the Board felt that under the earlier decision, federal control of Hawaiian intrastate commerce was mandatory. On this basis alone, the case merits reversal.[13]

The Board's brief, compressed to its essentials, is an argument that a subsidized air line (in Hawaii only) must never be exposed to business forces which will either (a) increase its subsidy need (by taking cargo), or (b) diminish such need (by spurring efficiency). We find nothing in the Board's position more constructive than a droning insistence that whatever impinges on a ward of the agency is contrary to the public interest. For a conflicting view, urging the need to emphasize state responsibility and to de-emphasize subsidy, we refer to President Kennedy's Special Transportation message to the Congress, excerpted in the Appendix to this Brief.

5. Residual Matters

The Board hints darkly that if the State succeeds to regulatory control under a federal exemption, a limitless flood of new carriers will choke Hawaii's airways and bankrupt the industry (CAB Br., 19, 23). This could occur only if both Hawaii and the CAB abdicated their duties. As to

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13 We have shown that no court decision and no congressional action has foreclosed the exemption issue. We again invite to this Court's attention the memoranda appended to the Senate Report on the Statehood Bill (S. Rep. No. 80, 86th Cong., 1st Sess., App. F (1959)), showing the virtual absence of federal interest in intra-Hawaiian interisland commerce (Island Opening Brief, 10). A further congressional expression that the islands of Hawaii are not to be treated as separate states is the provision in Public Law 86-661, 74 Stat. 527. That enactment authorized temporary certification of various supplemental air carriers and provided that for the purposes of the Act, "the State of Hawaii shall be considered one point."

Hawaii, we see no reason why it should regulate less wisely than California, under whose supervision Pacific Southwest Airlines has flourished to the point of evoking a CAB accolade. (Island Opening Brief, App. B). The Board could, indeed, condition an interisland exemption on the continuance of regulatory control by Hawaii, just as it has done in the case of intra-Alaskan air taxis, 14 C.F.R. 298.21(c). Under the cited regulation, the exemption of such taxis (also those in Alaska-Canada service) is expressly conditioned on their holding authority from Alaska. Thus has the Board worked out an accommodation with a state by transfer to the state of a congressionally-delegated function, in a constructive demonstration of pragmatic federalism.

C. PROOF AND PROCEDURE

The Board charges Island with an impressive succession of procedural shortcomings: (1) failure to set forth enough economic data in its application (CAB Br., 18-19); (2) failure to deny the answers of Aloha and Hawaiian (CAB Br., 25); and (3) failure to request a hearing (CAB Br., 11, 25). We consider these matters in order.

1. Factual Content of the Application

We are not sure where the Board feels that we fell short under this heading. Its emphasis on absence of "facts or supporting data" (CAB Br., 18) implies that Island should have filed and proved a certification case rather than an exemption application. Island, however, was entitled to elect, as it did elect, the type of relief to pursue and its petition met fully the requirement of the applicable rule (CAB Br., 18 n. 18). Under that rule, an exemption petition may comprise two types of material: (a) facts to be noticed officially, and (b) "affidavits establishing such other facts as the applicant desires the Board to rely upon" (14 C.F.R. 302.402(c)).

The basis of the claimed exemption was a set of constitutional, political and geographic relationships which are standard targets of official notice, coupled with basic facts as to the identity and activities of the parties which are matters of official record. Statistical minutiae were no part of Island's case and have no proper place in its petition, which reveals all that needs revelation as to public interest, undue burden, unusual circumstances, and other pertinent criteria.

2. Failure To Controvert Answers

Island's reasons for not replying to the answers were that (a) they were not responsive to the petition, and (b) they consisted of unsubstantiated allegations, conclusions and arguments (not evidence) to which no reply was necessary.

We repeat that the proceeding inaugurated by Island's petition was *not* an application for a certificate of public convenience and necessity, and neither the interveners nor the Board had authority to transmute it into one. The answers treated the petition as if it were such an application. To hold Island accountable for contesting allegations as to public convenience and necessity would mean that interveners have the power to bait an applicant into the waging of a battle it never entered.

Moreover, the Aloha and Hawaiian answers did not, in their material assertions, satisfy the Board's rule for consideration as evidence. The rule requires (14 CFR 302.406) that answers, like petitions, include (a) material officially noticeable; and (b) affidavits, of which none were submitted. Perhaps some of the interveners' statistical tables could be noticed officially but certainly the interveners' conclusory assertions on which the Board based its decision could not. A statement that "a third carrier competing on these routes would be disastrous" (R. 44) or "the Island charge that the certificated carriers cater to

the carriage trade is baseless" (R. 45) would not be evidence no matter how many oaths supported them; much less are they evidence when bandied about (as they were here) in a lawyer's brief. *Minnesota Rate Cases,* 230 U.S. 352, 33 S. Ct. 729, 767 (1913). This however, was the type of evidence on which the Board found in its order that the Federal Government's interest in Aloha and Hawaiian "could be adversely affected by the exemption requested;" that "Aloha estimates that Island's proposed service would divert $1,000,000 annual revenue;" that "Hawaiian estimates that the two subsidized carriers would lose an additional $4,856,000 annually." (R. 168(a)).

Denials of such "evidence" are not only unnecessary but futile: the Board found no facts, but only that Aloha and Hawaiian "estimate" various frightful eventualities. We may assume realistically that such estimates would not be abandoned or altered no matter how vociferously denied. Fortune-telling is not subject to the rules of common-law pleading.

3. Omission To Demand Hearing

Island did not demand a hearing because the facts on which it relied were officially noticeable and needed no further proof. It was under no obligation to demand a hearing for the purpose of enabling the interveners to establish their unproved assertions. Neither was it obliged to demand a hearing in order to disprove facts never proved by their proponents.

We contended in our opening brief that some form of procedural due process was needed before the Board could resolve the case against Island on unsustained assertions of its opponents. One case we cited (Island Opening Brief, 37) was *First National Bank of Smithfield* v. *First National Bank of E.N.C.,* 232 F. Supp. 725 (E.D.N.C., 1964). That case, as the Board noted, now stands reversed. *First National Bank of Smithfield* v. *Saxon,* 352 F. 2d 267 (4th Cir.,

1965). The reversal was first noted by *Shepard's Citations* after the Island brief was written.

The reversing decision merits attention on two counts: (a) it involved a 2-1 division, with a strong and arresting dissent by Judge Sobeloff (352 F. 2d at 273); and (b) the majority opinion dealt more harshly with the authority whose action was under review than did the decision of the District Court. The District Court had held that the Comptroller of the Currency had been obliged to hold a hearing on a request for a branch banking permit. The Court of Appeals ruled a hearing unnecessary. In so ruling, however, it held that a comptroller's finding reached after hearing would be reversal-proof if supported by substantial evidence, whereas a finding made without a hearing would be replaced *by a finding of the court after a trial de novo*. The reversal, we submit, justifies this Court in reaching its own decision on the Island exemption application without remand to the CAB.

Respectfully submitted,

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APPENDIX

On April 5th, 1962, the President sent to Congress a special message discussing "an efficient transportation system".[14] The philosophy therein expressed differs markedly from that set forth in the CAB Brief. The following are quotations from this message (4148-49, 50, 55):

> "No simple Federal solution can end the problems of any particular company or mode of transportation. On the contrary, I am convinced that less Federal Regulation and subsidization is in the long run a prime prerequisite of a healthy intercity transportation network.
>
> The constructive efforts of State and local governments as well as the transportation industry will also be needed to revitalize our transportation services."
>
> * * *
>
> "This basic objective can and must be achieved primarily by continued reliance on unsubsidized privately owned facilities, operating under the incentives of private profit and the checks of competition to the maximum extent practicable. The role of public policy should be to provide a consistent and comprehensive framework of equal competitive opportunity that will achieve this objective at the lowest economic and social cost to the Nation.
>
> This means a more coordinated Federal policy and a less segmented approach. It means equality of opportunity for all forms of transportation and their users and undue preference to none. It means greater reliance on the forces of competition and less reliance on the restraints of regulation."
>
> * * *
>
> "Our system of intercity public transportation—including railroads, trucks, buses, ships and barges, airplanes, and pipelines—is seriously weakened today by artificial distortions and inefficiencies inherent in existing Federal policies. Built up over the years, they can

[14] U.S. Code Cong. and Ad. News, 87th Cong., 2d Sess., page 4148 (1962).

be removed only gradually if we are to mitigate the hardships that are bound to arise in any program of far-reaching adjustment."

* * *

"At my request, the problems of urban transportation have been studied in detail by the Housing and Home Finance Administrator and the Secretary of Commerce. Their field investigations have included some 40 metropolitan and other communities, large and small. Their findings support the need for substantial expansion and important changes in the urban mass transportation program authorized in the Housing Act of 1961 as well as revisions in Federal highway legislation. They give dramatic emphasis, moreover, to the need for greater local initiative and to the responsibility of the States and municipalities to provide financial support and effective governmental auspices for strengthening and improving urban transportation."